

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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U.S. BANK NATIONAL :
ASSOCIATION, : Case No.: 19-CV-2307
Plaintiff, :
v. :
GOLDMAN SACHS MORTGAGE : New York, New York
COMPANY, et al., :
Defendants. : May 23, 2023

-----: CONFERENCE

TRANSCRIPT OF STATUS CONFERENCE HEARING
BEFORE THE HONORABLE JENNIFER E. WILLIS
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 THE DEPUTY CLERK: Docket Number:
2 19-cv-2305. We ask that attorneys for plaintiffs as
3 well as defendants please rise and state their names
4 for the record.

5 MR. MAZIN: Good afternoon, Judge Willis.
6 My name is Zachary Mazin. I'm with McKool Smith.
7 With me are my colleagues, Daniel Helder and Olivia
8 Visconti. And I should say Ms. Visconti is awaiting
9 admission to the New York State courts. If you'd
10 prefer that she sit in the gallery, we're happy to
11 accommodate that, but we'd like to have her here at
12 counsel's table, if that's okay with Your Honor.

13 THE COURT: That is fine.

14 MR. MAZIN: Thank you.

15 THE COURT: And good afternoon to all of
16 you.

17 Defense?

18 MR. JACOBSEN: Good afternoon, Your Honor.
19 Richard Jacobsen of Orrick, Herrington & Sutcliffe,
20 on behalf of Goldman Sachs. With me are my
21 colleagues, Nicholas Poli, Camille Rosca, David
22 Litterine-Kaufman, and Mr. Ansbro, who's been a
23 member of the Bar for some 40 years.

24 THE COURT: All right. Good afternoon to
25 you all as well.

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1 So we are here for a discovery dispute.
2 Plaintiff is asking to extend the deadline for
3 discovery nine months for two reasons; one, in order
4 to conduct -- I believe there's upwards of 20
5 depositions that are contemplated; and then two, in
6 order to do some verification discovery. I've
7 obviously reviewed the submissions of the parties.

8 I'll turn to you first, plaintiff.

9 MR. MAZIN: Thank you, Your Honor. I
10 actually think I can make things easy for the Court
11 today. We've made good progress on depositions. I
12 don't think there's anything on the deposition front
13 that requires Your Honor's intervention. Happy to
14 provide some context for that.

15 I don't know if Mr. Jacobsen has anything
16 he'd like to say about that. I'm happy to reserve
17 on that in the event that he does, but I don't have
18 anything that needs the Court's intervention there.

19 So that just leaves the issue of
20 third-party discovery. We colloquially refer to
21 this work as "verifications work." During the time
22 since we wrote this letter, we've continued to
23 engage with our expert and our vendors, and they're
24 now telling us that they can be done with this work
25 by August 31st. And so today, Your Honor, I'd like

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1 to ask that we only extend the fact discovery
2 deadline to September 29th. That would represent
3 five months rather than nine months from the
4 original deadline of April 27th.

5 And I think, more importantly, we've
6 determined that we do not need to also extend the
7 expert discovery schedule. That means that our
8 opening expert reports will continue to be due in
9 April of 2024, just as they were under the currently
10 operative CMO. So that keeps the entire case
11 timeline exactly on schedule from where it was.
12 We're just asking to shift an internal deadline.

13 Now, I should say that roughly a month ago,
14 we approached our friends at Orrick and we said,
15 look, we think we can actually shorten the request
16 to six months. They rejected that out of hand. And
17 yesterday, after, again, consulting with our expert
18 and vendors, we informed them of this, and they said
19 no yet again.

20 So I'm expecting Mr. Jacobsen to spend a
21 lot of time talking about how this is improper and
22 we could have done all this work before. And that's
23 fair. We acknowledge that in our papers. But I do
24 think that responding to events that occur in the
25 RMBS world, where they themselves were unleashing

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1 arguments at trial -- at trial -- that we hadn't
2 seen before constitutes a reason to change course.

3 We were trying to avoid doing this work.
4 It's costly. It's time-consuming. The hit rate is
5 low, given the passage of time, where we're going
6 back to employers from 20 -- excuse me -- from 2005
7 and 2006 and hoping to inquire about their
8 employment records from that time.

9 THE COURT: Well, Counsel, let me ask you
10 to respond to something that was in defendant's
11 portion of the joint letter. I'm sure this is an
12 argument that they are going to make, but let me,
13 sort of, anticipate it, which is that the arguments
14 that you point to in the RMBS world as, sort of,
15 being a new development which changed your calculus
16 of whether or not it made sense to spend the time
17 and the effort on this verification discovery per
18 defense, they say that these are arguments that are
19 commonly made; that these are arguments that they
20 themselves have made with respect to this particular
21 trustee.

22 And so what I'm gathering, at least from
23 this part of their argument is that this is not new,
24 and so the fact that you, obviously, cite to a
25 particular case -- it looked like there was a

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1 decision, I think, January of 2023 that you cited
2 to -- that that is not -- that you should not have
3 been surprised by that; that that is something that
4 you were on notice of as a potential argument that
5 could be made, and that, as a result, that does not
6 create, sort of, good cause to extend the deadline.

7 And, certainly, a lot of the space, a lot
8 of the real estate in your section of the joint
9 letter talks about the fact that, you know, defense
10 won't be harmed by this, that they won't be burdened
11 by it. And even, I think, the tightening of the
12 schedule -- which I certainly appreciate your
13 efforts to, sort of, continue to move this along
14 from the time that you filed the letter until now,
15 but all of those efforts really just speak to the --
16 you know, is this going to affect any other
17 deadlines? Is this going to affect defense?

18 And, certainly, the idea of prejudice is a
19 factor, but I think the main one when we look at
20 good cause is diligence on the part of the
21 plaintiff. So speak to me about, you know,
22 defense's argument that these are not novel
23 arguments and that these, therefore, are arguments
24 you would have known about, or should have known
25 about, and should have planned accordingly in terms

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1 of whether you wanted to do this verification
2 discovery or not.

3 MR. MAZIN: Sure. Thank you for giving me
4 the opportunity to respond to that, Judge.

5 Mr. Jacobsen is right about one thing. The
6 defense bar in the RMBS world has been arguing that
7 any evidence that postdates the closing of the loan
8 should not be admissible and is not relevant.
9 They've lost that argument every time they've
10 attempted it. And so they may attempt it again
11 here, but that's not what -- and I should note the
12 citation in their portion of the letter brief refers
13 to that argument. That's not what we saw happening.
14 That's not what we're talking about, and that's not
15 what galvanized us to say, you know what, we do need
16 to go back and conduct verification discovery here
17 to insulate us against an argument we may see.

18 They specifically drew a distinction
19 between certain types of post-closing evidence.
20 There's publicly available post-closing evidence
21 about borrowers' ability to repay their loan. For
22 instance, we can go pull bankruptcy filings that
23 postdate closing where a borrower may have filed
24 bankruptcy, and they said, actually, you know what,
25 back in 2005, I was actually making \$20,000, when,

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1 on their loan application, they added a zero.

2 Verifications are actual outreach to, in
3 this case, just employers. Investment banks like
4 Goldman Sachs do this work all the time outside of
5 the context of litigation, right, where they will
6 actually reach out to borrowers themselves and say,
7 hey, how much money did you make in 2005? Tell us
8 again. They could reach out to employers. For
9 self-employed borrowers, they may contact the
10 accountant who signed the letter in the loan file
11 saying, yes, this person made, you know, "X"
12 thousands of dollars in the past year.

13 So that was the development at the HEAT
14 trial that we saw. And we saw the judge's reaction
15 to it, where they were attempting to color the
16 evidence that the plaintiff did introduce by noting
17 the absence of this other evidence. And that's why
18 we determined that we needed to change course.

19 So, you know, again, this was -- there was
20 no lack of diligence on our part, Your Honor. I
21 personally have been litigating RMBS matters now for
22 going on a decade, as have my friends at Orrick.
23 We've been doing this in different cases. This is
24 my seventh and eighth cases. I'm sure Mr. Jacobsen
25 has a similar number or more. We watch developments

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1 occur across the RMBS landscape because it's natural
2 for a judge hearing an RMBS case in one court to be
3 interested in what a judge in another court has to
4 say on the same matter, right?

5 The core of these cases are all roughly the
6 same. There's differences on the margins. But the
7 heart of the cases are these investment banks
8 securitized loans that they never should have
9 securitized. They made reps and warrants about them
10 that the loans did not comport to. They promised to
11 buy back the bad ones, and then they didn't. That's
12 the heart of these cases.

13 So we think, given that development, given
14 the fact that we haven't been asleep at the switch,
15 we've been working diligently -- this is the first
16 real extension that we're asking for. There was a
17 modification to the schedule previously that was a
18 result of a decision that Judge Nathan issued while
19 she was presiding over the case before her
20 elevation. And that was part of our effort to
21 narrow the scope, to use sampling to evaluate the
22 pool of loans rather than going loan by loan.

23 Goldman could have consented to sampling
24 notwithstanding their view of the governing
25 agreements. They convinced Judge Nathan they were

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1 right about that. Congratulations. But they still
2 could have consented to saying, you know what, we'll
3 use sampling anyway because it will compress the
4 time necessary to litigate this case, and you arrive
5 at roughly the same place. And we would have taken
6 the haircut. They didn't do that. And the only
7 reason they didn't do that is because they wanted to
8 increase the cost and the burden on the plaintiffs
9 here.

10 So, again, given that this is our first
11 real request for an extension, it doesn't shift the
12 overall timeline of the case at all, and they can't
13 identify an iota of prejudice, Your Honor -- they
14 won't have to do this work themselves. They won't
15 have to do any additional work at all, other than
16 receiving whatever it is we're able to obtain from
17 third parties. We think that this is an easy
18 extension to grant, if I may, and we'd -- I'm happy
19 to respond to anything else that Your Honor is
20 interested in hearing about. I'm happy to talk more
21 about the verifications process or the underwriting,
22 if you're at all interested, Your Honor.

23 THE COURT: Let me hear from defense first,
24 and then I may have additional questions for you
25 based on their arguments.

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1 MR. MAZIN: Thank you.

2 MR. JACOBSEN: Good afternoon, Your Honor.

3 It's nice to meet you. I just want to -- for the --
4 I have an ear that hasn't popped since I landed last
5 week, so I am functionally deaf in my left ear. I
6 apologize if I'm loud or have trouble hearing.

7 Your Honor, I respect Mr. Mazin. We have
8 been litigating against each other in a number of
9 cases for years. Much of what he just said, I
10 submit, is factually incorrect. This case has been
11 pending for two and a half years. And I want to go
12 back to where this case started.

13 It was filed in 2019. In February '20 --
14 on February 26, 2021, there was a conference before
15 Judge Nathan to contemplate what the schedule would
16 be if sampling is not permitted, and that had
17 nothing to do with burden, whatever. It had to do
18 with the law and what the contract requires,
19 evidenced by the Court of Appeals decision in HEAT
20 '07-1, which completely upset the landscape of RMBS
21 litigation.

22 And I want to quote from Judge Nathan, who
23 was abundantly clear, Judge Willis. And this is the
24 February 26, 2021 conference before Judge Nathan.
25 And I'm citing the page 26, beginning at line 8,

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1 Your Honor.

2 Quote from Judge Nathan: "But other than
3 that, I'll give you this schedule" -- keep in mind,
4 this is over two years ago -- "but we'll declare an
5 understanding that, you know, barring something
6 unexpected, truly unexpected, we're going to stick
7 with this. So you have to keep your foot on the gas
8 as if it were half of the amount of time that your
9 schedule allows for. Is that reasonable,
10 Mr. Johnson?"

11 Your Honor, I'll represent that Mr. Johnson
12 is Mr. Mazin's partner on this case and co-lead
13 counsel.

14 MR. MAZIN: I'll stip that.

15 MR. JACOBSEN: Thank you. Agreement.
16 We're making progress.

17 Mr. Johnson: "It absolutely is, Your
18 Honor. Our approach is always to keep on the gas."

19 Your Honor, their actions -- or better put,
20 lack thereof -- during the entirety of this case is
21 the antithesis of the diligence that's required to
22 show good cause for an extension.

23 THE COURT: Counsel, let me ask you,
24 though --

25 MR. JACOBSEN: Yes.

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1 THE COURT: And I certainly want to hear
2 all of what you have to say, but I'm, sort of,
3 thinking about the responses that plaintiff just
4 made. And I'd like to hear a response to that
5 before I lose my train of thought.

6 MR. JACOBSEN: Yes, Your Honor.

7 THE COURT: Based on the quote that you
8 just read from Judge Nathan's decision, she talked
9 about -- well, not decision, but from the
10 conference, from her oral decision at the
11 conference, that, barring something unexpected -- or
12 "truly unexpected," I think, was the language you
13 used. And what I hear coming from plaintiff is that
14 this recent development in the landscape of these
15 type of cases, that January 2023 decision that they
16 cite to, that presumably their argument, as I hear
17 it, is that that was unexpected; that that was a
18 change which, as a result, has affected how they
19 believe they should prepare their case.

20 So I certainly hear you as saying Judge
21 Nathan set a schedule, and it was one that had a lot
22 of time built into it, and that the expectation was
23 everyone should treat that as a firm deadline and
24 don't wait until you get to the last minute. You
25 should, you know, plan to be done in half that time.

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1 I hear all of that. But she obviously did leave
2 that sort of escape hatch if there was something
3 unexpected that developed.

4 And what I hear from plaintiff -- and,
5 obviously, you can explain to me why they're wrong
6 about that. But what I hear from them is that that
7 change was unexpected and that that is what changed
8 their priorities about how they would conduct
9 discovery.

10 So tell me why this decision they cite to
11 was not an unexpected development.

12 MR. JACOBSEN: Absolutely not unexpected,
13 Your Honor. And I'm going to go back to a timeline,
14 and this is one where, frankly, Mr. Mazin and I have
15 personal experience because we litigated this
16 against each other for different clients back in, I
17 think, 2015.

18 I have been doing RMBS litigation since
19 roughly 2009. I think Mr. Mazin has been doing it
20 at least for a decade. I don't know, but certainly
21 as long as a decade. The sort of verification
22 discovery they're looking for, third-party subpoenas
23 to borrowers or borrowers' employers in this case.
24 That has been litigated over. That discovery has
25 been served and sought. There have been protocols

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1 for it for almost, if not over, a decade. Point of
2 fact. And we were actually reminiscing about it,
3 Mr. Mazin and I, before we walked into your
4 courtroom, Your Honor, we were actually right here
5 in your courtroom.

6 In 2015, there was a hearing in front of a
7 special master who was designated to deal with all
8 of the remaining trustee cases, RMBS cases just like
9 this one in New York Supreme Court. It took place
10 in The New York Times building. I was there.
11 Mr. Mazin was there. All of this discovery has been
12 available to plaintiffs throughout. There's been no
13 new development. There's no -- been no constraint
14 on what they can or cannot do.

15 And, furthermore, they made the tactical
16 and strategic decision not to pursue it. There was
17 no ruling in this Court, no indication from this
18 Court, nothing from Judge Nathan, and certainly
19 nothing from Judge Gardephe that said they can't
20 pursue it. They made the decision not to, Your
21 Honor.

22 THE COURT: Let me just -- let me just,
23 sort of, drill down on this because I want to make
24 sure I'm fully understanding everybody's arguments
25 and that you're all speaking to the same point.

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1 MR. JACOBSEN: Yes, Your Honor.

2 THE COURT: What I heard plaintiff
3 saying -- plaintiff's counsel saying, was not so
4 much that the concept of this type of discovery
5 being new one way or another, but that the arguments
6 that were made in that particular case, sort of,
7 arguments holding it against the plaintiff or saying
8 to -- you know, to the trier of fact, you should
9 hold it against plaintiff because they don't have
10 this publicly available information, that that --
11 and, obviously, plaintiff will correct me if I'm
12 wrong -- that that is the thing that he is saying is
13 different. So not the idea that you could get this
14 information, but that an argument was made by
15 defense counsel in that particular case of, they
16 didn't have this, or they didn't show you that, and
17 that that somehow changed the landscape.

18 So I think that's what I understood him to
19 be saying. So tell me why that is not in --

20 MR. JACOBSEN: That, too --

21 THE COURT: -- of recent development.

22 MR. JACOBSEN: I didn't mean to interrupt,
23 Your Honor.

24 That, too, was incorrect as well. What
25 Mr. Mazin, I believe, is referring to was a case

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1 that my team and I tried for Credit Suisse in
2 January and February and a cross-examination that
3 happened involving a different bank, different
4 trusts in a state court, not federal court, in front
5 of a different judge.

6 That is not a basis to say that they all of
7 a sudden have a change in the law or some unforeseen
8 circumstance that now they're entitled to seek
9 discovery, that they first broached with us in March
10 of 2023, Your Honor.

11 If they were being diligent and if I were
12 them, I would have put in my marker immediately. I
13 would have started papering over immediately. Wow,
14 it looks like there's a C change in the law. It
15 looks like Orrick, on behalf of Goldman Sachs -- you
16 may argue that this material is inadmissible. I
17 would -- I would also posit, Your Honor -- and I can
18 give you specific examples -- the home equity
19 mortgage trust cases, which we euphemistically refer
20 to as the "Euphrates cases," that was one of the
21 cases that was going to go up to the Court of
22 Appeals on the sampling issue before we settled that
23 case. We, instead, just went up on the HEAT '07-1
24 case.

25 I recall a -- and it's not Mr. Mazin's

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1 firm, to be clear and to be fair. Quinn Emanuel,
2 representing U.S. Bank in a repurchase case against
3 Credit Suisse, tried to drop 600 subpoenas on
4 third-party borrowers and employers within fact
5 discovery. That took place -- and my colleagues
6 will correct me -- I believe, in 2014, 2015. At the
7 latest, 2016.

8 MAR, another case that was in federal
9 court. I believe that this discovery was sought and
10 contemplated. And either *Ambac versus Credit Suisse*
11 or *FGIC versus Credit Suisse* -- I will get that cite
12 to Your Honor -- Quinn Emanuel again. And this is
13 all open. There was a defense group and there was a
14 plaintiff group. Everybody knew this. They were
15 seeking this discovery then.

16 Throughout, defendants have always been
17 arguing about the legitimacy of this evidence,
18 whether or not it's appropriate, whether or not they
19 can -- for instance, borrower verifications or
20 bankruptcy filings, whether or not that is
21 cognizable, or whether or not that's an exception to
22 hearsay. We argue it is hearsay. None of this is
23 novel, Your Honor.

24 And I would go back to where you were when
25 you were questioning Mr. Mazin, Judge Willis. This

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1 is about diligence, their diligence. They've had
2 two and a half years to do this. And I would also
3 submit that the fact that -- the way in which
4 they've conducted or, in many instances, not
5 conducted depositions is emblematic of the way that
6 they're proceeding with this case. They've had two
7 and a half years to notice depositions. We
8 actually, as the defendant, noticed our depositions
9 first.

10 THE COURT: Well, let me pause you for just
11 a moment because I want to make sure we're focusing
12 on the issues that are still in play.

13 Plaintiff had indicated at the beginning of
14 his argument that the request to extend the deadline
15 with respect to depositions was no longer an area
16 that required judicial intervention because either
17 the -- these big -- you know, the substantial number
18 has been done already, whatever it is. It seems
19 that that is now on track.

20 And do you agree with that, that the
21 question about extending the deadline with respect
22 to depositions is, sort of, no longer in play, and
23 that, really, we're just talking about allowing for
24 this additional non-party discovery?

25 MR. JACOBSEN: Your Honor, respectfully, I

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1 think it is in play insofar as the discovery cutoff
2 in this case was April 27, 2023. Every single
3 Goldman Sachs -- I just want to give you a little
4 context, if you can give me a little latitude here.

5 Every single Goldman Sachs deponent in this
6 case, save for one, is a former employee, most of
7 whom's employment ended 15 or 16 years ago. We have
8 made all of them available either before the
9 discovery cutoff or during May. They have been
10 unable to or unwilling to pursue some of those. We
11 actually noticed our depositions of U.S. Bank before
12 they did because we weren't going to -- we weren't
13 going to wait until the end. And, frankly, we were
14 waiting to see if they were going to notice
15 depositions. We had to make that strategic
16 decision. They noticed their depositions a couple
17 weeks later.

18 We've been trying mightily -- mightily --
19 to get these depositions done within April and May.
20 We made every one of our witnesses available April
21 and May, and we've been notified that two of our
22 witnesses they can't take until well into June.

23 Your Honor, I'm using this as an example to
24 show that the standard here for good cause, as you
25 said, and as the law states in Zarazitsia, Channel

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1 One, Deezer, Tatizian (phonetic) -- these names -- I
2 did not I choose these case names -- Compagno
3 (phonetic). I'm going to go with PepsiCola
4 Company -- versus PepsiCola Company.

5 All of them speak to diligence. All of
6 them speak to their burden. All of them speak to
7 the plaintiffs having to demonstrate how they could
8 have -- they couldn't get this stuff done because of
9 some unforeseen circumstance and, throughout, they
10 were doing everything they could to get the
11 discovery done.

12 Your Honor, I think their conduct in this
13 case, their lack of diligence, does not meet the
14 standard. Putting the depositions aside, the
15 verifications they're speaking of, if they got it,
16 it wouldn't just be a four- or five-month extension.
17 We have no obligation to affirmatively go out and
18 take our own, kind of, prophylactic or responsive
19 discovery. It's their burden.

20 We would be entitled to some extension to
21 respond to that. It was their obligation to tee
22 this up well before they could have. Mr. Mazin's
23 firm, his prior firm, his current firm, his
24 colleagues, they've all known that this has been
25 available to them for a decade. They're not

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1 entitled, I respectfully submit, to seek an
2 extension and get an extension where from their lack
3 of diligence and their lack -- or their strategic or
4 tactical decision are not -- are waiting until the
5 last days of discovery -- literally days -- to seek
6 something that's been available to them throughout.

7 Your Honor, I hope I answered all your
8 questions. If I didn't, I'm happy to go back to
9 anything that you had asked.

10 THE COURT: I think you have.

11 MR. JACOBSEN: Thank you very much, Your
12 Honor.

13 THE COURT: Plaintiff, I'll turn back to
14 you. This is obviously your request, so I'll give
15 you the last word. I also would like to hear
16 specifically your response, again, to defense's
17 argument that the landscape of, sort of, the
18 verification discovery -- the verification discovery
19 landscape from defense's viewpoint has not changed.

20
21 (Audio ends)

22
23
24
25

1 C E R T I F I C A T E
2

3 I, Adrienne M. Mignano, certify that the
4 foregoing transcript of proceedings in the case of
5 U.S. Bank National Association v. Goldman Sachs
6 Mortgage Company, et al.,; Docket #19cv2307 was
7 prepared using digital transcription software and is
8 a true and accurate record of the proceedings.

9

10

11 Signature Adrienne M. Mignano
12 ADRIENNE M. MIGNANO, RPR

13

14 Date: May 25, 2023
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